RECENT DECISIONS.

JEROME MICHAEL, *Editor-in-Charge.*
JOHN VANCE HEWITT, *Associate Editor.*

ADVERSE POSSESSION—DISSEISIN—INTENTION.—The plaintiff originally entered as defendant's tenant but in 1897 repudiated the tenancy by purchasing an outstanding title and taking a conveyance in the name of a third party as trustee. In 1901 the trustee conveyed to the plaintiff who held until 1908 when he brought action to quiet title. *Held,* the possession of the plaintiff as *cestui que trust* enured to the paper title in the trustee which was adverse to the claim of the defendant. *Andrews* v. *Rio Grande Live Stock Co.* (N. M. 1911) 120 Pac. 311. See Notes, p. 363.

BANKRUPTCY—SET-OFF—DEBTS DUE THE TRUSTEE AND DEBTS OF BANKRUPT.—The plaintiff, as trustee, sued to recover the value of services rendered by himself and the bankrupt. The defendant set up a counterclaim arising out of the bankrupt's breach of another contract, occurring after bankruptcy. Under the Bankruptcy Act of 1898, § 68, provable claims may be set off in "cases of mutual debts and credits." *Held,* the set-off should be allowed against the claim for the services of the bankrupt, but not for those rendered by the trustee. *Howard et al.* v. *Magazine & Book Co.* (1911) 131 N. Y. Supp. 916.

It is doubtful whether claims on contracts, the performance of which does not become due until after bankruptcy, should be provable in the bankruptcy proceedings, *Watson* v. *Merrill* (1905) 136 Fed. 359; *In re Imperial Brewing Co.* (1906) 143 Fed. 579, since all provable debts must be owing at the time the petition is filed. Bankruptcy Act of 1898, § 63. Some courts, however, probably in recognition of the manifest desirability of settling all the bankrupt's affairs, have allowed such claims to be proved, upon various theories, 8 COLUMBIA LAW REVIEW 305; *In re Pettengill* (1905) 137 Fed. 143, and it is evident that these claims against the bankrupt's estate and claims for services rendered by him are mutual debts and credits. But a trustee in bankruptcy is not compelled to continue the performance of the bankrupt's contracts, Woodman, Trustees in Bankruptcy, 57; *Watson* v. *Merrill supra,* and if he elects to do so, he acts as a representative of the creditors rather than of the bankrupt. 1 COLUMBIA LAW REVIEW 377; see *Edmondson* v. *Hyde* (1872) 2 Sawy. 205. For the claims arising out of such transactions he is therefore entitled to complete compensation, just as he must fully answer for the obligations incurred therein. It would accordingly be manifestly unfair to permit the bankrupt's creditors to set off against such claims a debt of the bankrupt which might otherwise be satisfied by a *pro rata* share of his assets. *Alloway* v. *Steere* (1882) L. R. 10 Q. B. D. 22; see *Ferris* v. *Mullan* (1877) 57 Ind. 164.

CONFLICT OF LAWS—CARRIERS—INTERSTATE CONTRACT OF AFFREIGHTMENT.—The plaintiff and defendant contracted in the State of Washington for the carriage of freight from a point within that State to a California city. In California the carrier's liability was limited

by statute, while in Washington the common law liability prevailed. *Held,* the law of Washington must govern. *Bertonneau* v. *So. Pac. Co.* (Cal. 1911) 120 Pac. 53.

In considering the general rule that contracts are governed by the *lex loci contractus,* it must be recognized that the law thus designated is that with reference to which the agreement is made. See *Pritchard* v. *Norton* (1882) 106 U. S. 124, 136; Dicey, Confl. of L., (Am. ed.) 580. In matters of performance this is presumed to be the law of the place of performance, and that law will generally govern the essential validity of the contract. *Waverly Bank* v. *Hall* (1892) 150 Pa. 466. But where the contract is to be performed in several jurisdictions, this presumption is repelled. For this reason, interstate contracts of affreightment are by the weight of authority deemed to be controlled by the law of the place where the contract is made, when performance begins there. *Morgan* v. *N. O. etc. R. R. Co.* (1876) 2 Woods 244. This rule, largely one of convenience, is given a logical foundation, by conceiving of the performance contemplated by such a contract as single and indivisible. 1 Hutchinson, Carriers, (3rd ed.) §§ 210, 212. Evidently then the *lex loci solutionis* is not the law of the place where performance is to be completed, *Hartmann* v. *L. & N. Ry. Co.* (1889) 39 Mo. App. 88, 94, although it has been held that such law governs, on the erroneous theory that the place of delivery is the sole place of performance. 2 Wharton, Confl. of L., (3rd ed.) 1060; Story, Confl. of L., (8th ed.) 377, n. A third view, which apparently ignores that the obligations arising out of a contract can be created only by the laws of a single jurisdiction, is that interstate contracts of carriage are divisible and that their obligations vary in each jurisdiction in which they may be partly performed. 1 Hutchinson, Carriers, (3rd ed.) § 210.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE REGULATION OF WATER RIGHTS.—A State board of irrigation permitted the appellant to use a public stream for water power, stipulating that the power generated should not be used outside the State. *Held,* the limitation was constitutional. *Kirk* v. *Board of Irrigation* (Neb. 1912) 134 N. W. 167.

While the owners of oil fields have no property rights in the oil until it is reduced to possession, they have nevertheless a peculiar right as against the rest of the community to obtain it. The State cannot, therefore, deny them the right to use it in interstate commerce when it is obtained, *Oklahoma* v. *Kansas Nat. Gas Co.* (1911) 221 U. S. 229; *M'f'rs Gas Co.* v. *Indiana Nat. Gas Co.* (1900) 155 Ind. 545, although it can regulate their enjoyment of the right for the benefit of all similarly situated. *Ohio Oil Co.* v. *Indiana* (1900) 177 U. S. 190; *Lindsley* v. *Nat. Carb. Gas Co.* (1911) 220 U. S. 61. Things *ferae naturae,* on the other hand, belong to the whole community, as represented by the State, which may therefore prohibit their acquisition entirely or allow it on terms which qualify the property which may be acquired in them, by forbidding other than domestic use to be made of them. *Geer* v. *Connecticutt* (1895) 161 U. S. 519; *contra, State* v. *Saunders* (1877) 19 Kan. 127. The State, it would seem, has a similar interest in even a private stream, over and above the right of riparian owners to use the water on their land, so that it is justified in forbidding the diversion of its waters into another State. *McCarter* v. *Hudson Co. Water Co.* (1906) 70 N. J. Eq. 695, aff'd (1907) 209

U. S. 349. This principle would seem to apply with even greater force in the jurisdiction of the principal case, where the stream is deemed public property. *Meng* v. *Coffee* (1903) 67 Neb. 500. The fact that the limitation is here placed on the use of power, the direct product of the stream, rather than on the water used, affords, it is conceived, no sound basis for a distinction, although it must be conceded that the Supreme Court has shown an increasing tendency to limit the exercise of a State's power where it even indirectly contravenes the freedom of interstate commerce. See *Oklahoma* v. *Kansas Nat. Gas Co. supra.*

CORPORATIONS—STOCK—DISTINGUISHED FROM BONDS.—The holders of certain instruments issued by a corporation, purporting to be bonds, bearing a fixed interest, payable at a date certain and secured by a mortgage, sought to reach the proceeds of a sale of the mortgaged property. The instruments also contained stipulations for a share of the net income and of the assets, upon dissolution. *Held,* one judge dissenting, the instruments were a species of preferred stock certificates, and the plaintiffs were not entitled to priority over general creditors. *Cass* v. *Realty Securities Co.* (1911) 132 N. Y. Supp. 1074.

As contrasted with a bond, the holder of which is a corporate creditor, a certificate of stock denotes membership in a corporation and ownership of a share of its business. *People* v. *Miller* (1904) 180 N. Y. 16; 1 Machen, Corporations, § 546. When instruments contain some of the attributes of each, it is for the courts to determine their character by a consideration of the intention of the parties, and to declare unenforceable provisions inconsistent with the real nature of the instrument. *Miller* v. *Ratterman* (1890) 47 Oh. St. 141; *Savannah Co.* v. *Silverberg* (1899) 108 Ga. 281. Thus a promise to repay the face value of the paper, or a guaranty of fixed interest to be paid even in the absence of profit, cannot be annexed to stock. *Boney* v. *Williams* (1897) 55 N. J. Eq. 691; *Ohio College* v. *Rosenthal* (1887) 45 Oh. St. 183. Nor can a stipulation for priority over general creditors be made a term thereof, except by express statutory authorization, though preferences between classes of stockholders, both as to dividends and assets, are permissible. *Warren* v. *King* (1882) 108 U. S. 389; *Heller* v. *Marine Bank* (1899) 89 Md. 602. The presence of such terms in the writing under consideration, together with the fact that the parties designated it as a bond, is, therefore, strong evidence of an intention to create such an instrument. *Burt* v. *Rattle* (1876) 31 Oh. St. 116; *Hamlin* v. *Toledo, etc. Ry. Co.* (1897) 78 Fed. 664. This evidence would seem to outweigh the stipulations providing for a share of the income and assets, particularly since the amount of interest payable on a bond may by agreement be made to depend on income, although it is usually invariable. 3 Cook, Corporations, (6th ed.) § 773.

CRIMINAL LAW—DOUBLE JEOPARDY—DISCHARGE OF JURY—FAILURE TO AGREE.—On a former trial of the defendant for murder the jury failed to agree and were discharged. There was constitutional and statutory provision for such procedure in cases of "manifest necessity." Upon the second trial the defendant pleaded former jeopardy. *Held,* the plea was bad, and the trial court's action would not be reviewed in the absence of gross abuse of discretion. *Andrews* v. *State* (Ala. 1911) 56 So. 998.

By the weight of authority and reason, a prisoner is put in jeopardy

when he is charged with crime before a proper tribunal, even though no verdict is rendered. *Comw.* v. *Fitzpatrick* (1888) 121 Pa. 109; *Reg.* v. *Winsor* (1866) 10 Cox C. C. 276. But the statutory provisions in the principal case are merely declaratory of the common law in so far as they provide that a defendant may derive no advantage from the discharge of a jury in cases of necessity. *People* v. *Olcott* (N. Y. 1801) 2 Johns. Cas. 301. The decisions are not uniform, however, as to what constitutes such necessity. By the better and generally accepted view it need not be physically impossible to proceed with the trial, but it is sufficient that so to do would be futile or productive of evil. *Reg.* v. *Winsor supra; People* v. *Olcott supra; contra, Mahala* v. *State* (Tenn. 1837) 10 Yerg. 532. The discharge of the jury therefore becomes necessary when there is no reasonable expectation of their reaching a unanimous conclusion. *Dreyer* v. *Illinois* (1902) 187 U. S. 71; *Ex parte McLaughlin* (1871) 41 Cal. 211; *contra, Mahala* v. *State supra; Comw.* v. *Fitzpatrick supra.* The ascertainment of this fact must of course be left to the trial judge in the exercise of his discretion. By the prevailing practice, his discretion is not absolute, *Ex parte Maxwell* (1876) 11 Nev. 428; *contra, People* v. *Green* (N. Y. 1834) 13 Wend. 55, but the appellate courts will decide by an examination of the record whether there has been an abuse of discretion. *State* v. *Walker* (1866) 26 Ind. 346; *Poage* v. *State* (1854) 3 Oh. St. 229. This function should be cautiously performed because of the peculiar opportunity of the trial court to judge of the facts. *State* v. *Harris* (1907) 119 La. 297; *Penn* v. *State* (1896) 36 Tex. Cr. R. 140.

DIVORCE—LIMITED SEPARATION—RES ADJUDICATA.—The plaintiff obtained a limited separation, accepted alimony, and upon the expiration of the period fixed by the decree, brought suit for a permanent separation, basing her cause of action upon the same facts. *Held,* one judge dissenting, the prior decree constituted no bar. *Murdock* v. *Murdock* (1911) 132 N. Y. Supp. 964.

The extent of the jurisdiction over marital actions created by statute, *Burtis* v. *Burtis* (N. Y. 1825) Hopk. Ch. 557; *Durham* v. *Durham* (N. Y. 1904) 99 App. Div. 450, is determined by an application of common law principles. *Brown* v. *Brown* (1859) 37 N. H. 536. It is therefore immaterial that the statutes confer a discretion upon the court, *Young* v. *Young* (1808) 4 Mass. 430; see *Barrere* v. *Barrere* (N. Y. 1819) 4 Johns. Ch. 187, to grant either a permanent or a limited separation according to the circumstances of each case. *McNamara* v. *McNamara* (N. Y. 1859) 9 Abb. Prac. 18; *Sullivan* v. *Sullivan* (N. Y. 1877) 9 J. & S. 519; *Erkencrack* v *Erkencrack* (1884) 96 N. Y. 456. Either judgment would constitute a final termination upon the merits, *Wagner* v. *Wagner* (1886) 36 Minn. 239, 241, and as *res adjudicata, Johnson* v. *Johnson* (1894) 57 Minn. 100, would bar any subsequent suit on the same facts. *Fera* v. *Fera* (1867) 98 Mass. 155; *Thurston* v. *Thurston* (1868) 99 Mass. 39. Although evidence introduced in the former suit would be clearly admissible to explain the nature of subsequent acts, the plaintiff in the principal case failed to state additional facts sufficient to constitute a cause of action. *Doe* v. *Doe* (N. Y. 1889) 52 Hun 405. Moreover it is well settled that although several actions may be brought on a given state of facts, only one satisfaction will be given. *Barth* v. *Loeffelholtz* (1901) 108 Wis. 562; Agnew's Appeal (Pa. 1883) 3 Walk. 320. The plaintiff in the principal case would, therefore, seem entitled to no further

relief after having accepted the alimony under the prior decree, instead of appealing therefrom. 2 Bishop, Mar. Div. & Sep., § 1587.

EQUITY—BILL TO SET ASIDE FRAUDULENT CONVEYANCE—REVIEW OF PREVIOUS DECREE.—The plaintiff filed a bill to set aside a fraudulent conveyance and to apply the property in satisfaction of a decree rendered against the defendant prior to the conveyance. The defendant's answer attacked the merits of the prior suit. *Held,* two judges dissenting, the merits of the prior decree could not be examined except by a bill to review. *Hultberg et al.* v. *Anderson et al.* (Ill. 1911) 97 N. E. 216.

When a decree itself furnishes no means of satisfaction, and the aid of equity is required to remedy this defect, the weight of authority permits the defendant to question the merits of the original suit. *Hamilton* v. *Houghton* (1820) 2 Bligh 169; *Gay* v. *Parpart* (1882) 106 U. S. 679; *contra, Rogers* v. *Rogers* (Ky. 1854) 15 B. Mon. 364. This seems correct, for equity should not supplement the decree unless convinced of its merits. *Wadhams* v. *Gay* (1874) 73 Ill. 415. But a bill to set aside a fraudulent conveyance in order to satisfy a former decree does not render an incomplete decree enforceable, but merely nullifies subsequent acts which have made execution useless. *Farnsworth* v. *Strasler* (1851) 12 Ill. 482. The court, therefore, is not called upon to participate in the settlement of the original suit and should have no interest in questioning it. All matters material to the first suit are *res adjudicata,* and equity should restore the parties to the position in which they were placed by the court, regardless of the merits of the decree. *Pestel* v. *Primm* (1884) 109 Ill. 353; *Jenkins* v. *International Bank* (1884) 111 Ill. 462; *contra, Bean* v. *Smith* (1821) 2 Mason 252. Otherwise, it would be within the power of an unsuccessful defendant to have the cause re-opened at any time by his own misconduct.

EQUITY—MULTIPLICITY OF SUITS—INJUNCTION.—The plaintiff sought to enjoin one hundred and ten actions brought at law to recover damages for the loss of life resulting from an explosion, and to have the question of its negligence determined in the suit for the injunction. *Held,* the court was without jurisdiction. *Southern Steel Co.* v. *Hopkins* (Ala. 1911) 57 So. 11.

It is settled that equity will assume jurisdiction to prevent multiplicity of suits where all the parties suing have a common interest in the subject-matter, for the determination of the rights of one will necessarily determine the rights of all. 1 Pomeroy, Eq. Jur., (3rd ed.) § 243; High, Injunctions, (4th ed.) § 63. When only a common question of law or fact is involved, there is no uniform rule, but the court must use its discretion in each case to promote justice and the public convenience. *Hale* v. *Allinson* (1902) 188 U. S. 56; *Farmington* v. *Bank* (1892) 85 Me. 46. It is to be noted, however, that equity has seldom acted where the only ground of its jurisdiction was to prevent multiplicity of suits, unless the settlement of the common question would be practically, if not legally, conclusive of the rights of all the parties. *Sheffield Water Works* v. *Yeomans* (1866) L. R. 2 Ch. App. 8; *Chicago* v. *Collins* (1898) 175 Ill. 445. On the other hand, equity will not interfere when the circumstances of each case are so varied that the settlement of one will not substantially determine all, even though there is some one question common to each of

the suits. *Tribette* v. *Ill. etc. R. R. Co.* (1892) 70 Miss. 182; *Ducktown Sulphur Co.* v. *Fain* (1902) 109 Tenn. 56. This is particularly true in cases of negligence, and the principal case would therefore seem to be correctly decided. It is also important because it reverses a previous decision of the same court. *Southern Steel Co.* v. *Hopkins* (1908) 157 Ala. 175.

EVIDENCE—DEED BY MORTGAGOR TO MORTGAGEE—PAROL EVIDENCE.—The plaintiff, after having mortgaged certain property to the defendant, conveyed the same property to him by a deed absolute in form. In a suit to have this deed declared a mortgage, the plaintiff established that it was so intended by a preponderance of the evidence. *Held,* the evidence was sufficient. *Skeels* v. *Blanchard et al.* (Vt. 1911) 81 Atl. 913.

Parol evidence to show that a deed, absolute in form, was in fact intended as a mortgage is generally received in equity, 1 Jones, Mortgages, (5th ed.) 282, but not at law. *Gates* v. *Sutherland* (1889) 76 Mich. 231; *contra, McAnnulty* v. *Seick* (1882) 59 Ia. 585. A few courts confine this practice to cases of fraud, accident or mistake, *Chaires* v. *Brady* (1862) 10 Fla. 133, but the prevailing view is that the intention of the parties may always be shown by such evidence. *Peugh* v. *Davis* (1877) 96 U. S. 332. A mere preponderance of parol evidence, however, is usually insufficient to overcome the presumption that the terms of a written instrument express the intention of the parties. The party seeking to accomplish this must make out a clear, certain and unequivocal case. *Howland* v. *Blake* (1878) 97 U. S. 624; *Hyatt* v. *Cochran* (1873) 37 Ia. 309. But this rule may well be modified when the parties to the deed are already in the position of mortgagor and mortgagee. Because of the advantage which the latter has over the former, *McLeod* v. *Bullard* (1881) 84 N. C. 515, it is often held that when a mortgagor seeks to set aside a subsequent conveyance to his mortgagee, the burden is upon the mortgagee to show that the transaction was *bona fide* and for a good consideration. *Villa* v. *Rodriguez* (1870) 12 Wall. 323; Bigelow, Fraud, 347. Even in jurisdictions where a less rigorous rule obtains, the existence of the mortgage relationship is evidence of fraud. *Ford* v. *Olden* (1867) L. R. 3 Eq. 461; *Hall* v. *Hall* (1893) 41 S. C. 163; but see *DeMartin* v. *Phelan* (1891) 47 Fed. 761. The decision in the principal case, therefore, furnishes another example of the desire of courts of equity to protect a mortgagor and to prevent the clogging of his equity of redemption.

EVIDENCE—PAROL EVIDENCE—DEEDS—CONSIDERATION.—By statute heirs of the whole blood inherited exclusively lands which vested in the intestate by devise or gift. In a contest between such heirs and those of the half blood for a piece of land, the former sought to show by parol evidence that a deed containing a recital of a valuable consideration was a gift to the intestate. *Held,* one judge disenting, the evidence was admissible. *Harman* v. *Fisher* (Neb. 1912) 134 N. W. 246.

While it is agreed that parol evidence is generally admissible to explain, vary or even contradict the consideration clause of a deed, 2 Devlin, Deeds, (3rd ed.) § 822, there exists the greatest diversity of opinion as to whether the rule should apply where a good consideration is sought to be proved in place of a recited valuable one. Under the early authorities such evidence was excluded on the ground that it changed the legal effect of the deed. *Clarkson* v. *Hanway* (1723)

2 P. Wms. 203. This view is not without the support of some of the latter decisions, *Groves* v. *Groves* (1901) 65 Oh. St. 442; *Yates* v. *Burt* (Mo. 1912) 143 S. W. 73, but has been disregarded by other courts, which admit parol evidence to support an otherwise ineffective deed, although refusing to accept such evidence to invalidate a conveyance. *Gale* v. *Coburn* (Mass. 1836) 18 Pick. 397; *Hannan* v. *Oxley* (1868) 23 Wis. 519. Since the sole function of the consideration clause is to estop the grantor from setting up a resulting trust, see *Belden* v. *Seymour* (1830) 8 Conn. 304, 312, it is difficult to see why the true consideration cannot be shown for any purpose not inconsistent with this, and after the deed has taken effect as a conveyance, the admission of parol evidence to show that it operates as a gift instead of a deed of sale seems justifiable. *Peck* v. *Vandenberg* (1866) 30 Cal. 11; *Jones* v. *Jones* (1859) 12 Ind. 389. This result, moreover, is in accord with the trend of modern authority. *Velten* v. *Carmack* (1892) 23 Ore. 282; *Shehy* v. *Cunningham* (1909) 81 Oh. St. 289.

EVIDENCE—VALUE—OFFERS TO PURCHASE.—In proceedings to condemn land the defendant sought to introduce evidence of offers to purchase the land for the purpose of proving its value. *Held,* the evidence was inadmissible. *North Coast R. R. Co.* v. *Newman et al.* (Wash. 1911) 119 Pac. 823.

Offers to purchase are generally mere indirect evidence of the opinion of the offerer, and as such are objectionable as hearsay. *Sharp* v. *U. S.* (1903) 191 U. S. 341; *Y. P. R. R. Co.* v. *Bridger Coal Co.* (1906) 34 Mont. 545. Their weight as direct evidence of value is dependent upon many collateral facts, such as the *bona fides* of the offer, the motive inducing it, and the financial responsibility of the offerer, which it is often impossible to prove. *Fowler* v. *Middlesex* (1863) 88 Mass. 92; *Sharp* v. *U. S. supra.* It is, therefore, generally held that the probative force of such evidence is not sufficient to overcome its tendency to confuse and multiply issues, *St. J. etc. R. R. Co.* v. *Orr* (1871) 8 Kan. 419; *Perkins* v. *People* (1873) 27 Mich. 386, and it is excluded even if the offerer is in court ready to testify in person. *Hine* v. *Manhattan Ry. Co.* (1892) 132 N. Y. 477. But the value of this kind of evidence depends so much on the circumstances under which it is offered that its admission should be discretionary with the court. See 10 COLUMBIA LAW REVIEW 759. Therefore where the offers are admittedly *bona fide,* many objections to their admission disappear, and they are generally received. *Faust* v. *Hosford* (1903) 119 Ia. 97; *contra, Loloff* v. *Sterling* (1903) 31 Colo. 102. Evidence of offers to sell is governed by the same principles as offers to buy, but is often receivable as an admission by the owner. *Springer* v. *Chicago* (1891) 135 Ill. 553; 2 Lewis, Em. Dom., § 658.

EXECUTORS AND ADMINISTRATORS—SPECIFIC LEGACY—COST OF RECOVERING FROM ADVERSE CLAIMANT.—A legatee sought to charge the executor's accounts with the expenses to be incurred in recovering from an adverse claimant a chattel specifically bequeathed to him. The executor had assented to the legacy. *Held,* the executor should not be so charged. *In re Warren's Will* (1911) 133 N. Y. Supp. 145.

Upon the death of the testator an inchoate title to a specific legacy vests immediately in the legatee, entitling him to the income from the chattel, although the executor may retain possession for a year. *Bevan* v. *Cooper* (N. Y. 1876) 7 Hun 117. This incomplete title is made

absolute by the assent of the executor, who thereafter has no further right to the *res* as against the legatee. *Ross* v. *Davis* (1856) 17 Ark. 113; *Onondaga Trust Co.* v. *Price* (1882) 87 N. Y. 543. The executor, however, has not performed his full duty by acknowledging the title of specific legatees, for he must gather in all the assets, settle the claims of creditors, and discharge the legacies in accordance with the testator's intention. Schouler, Wills & Admin., 535; *Harrington* v. *Keteltas* (1883) 92 N. Y. 40. Thus chattels specifically bequeathed which have been pledged or otherwise encumbered by the testator must be redeemed at the expense of the estate, *Bothamley* v. *Sherson* (1875) L. R. 20 Eq. 304, as, in the absence of statute, in the analogous case of mortgaged realty. *Keene* v. *Munn* (1863) 16 N. J. Eq. 398; N. Y. Real Prop. Law § 250. Likewise it is the common law duty of the executor to recover a specific legacy adversely held, deliver it to the legatee, and pay the costs out of the general assets of the estate. *Perry* v. *Meddowcroft* (1841) 4 Beav. 197; 2 Williams, Exr's & Adm'rs, (10th ed.) 1178. Since the New York statutory requirement that the executor discharge specific legacies, Code Civ. Proc. § 2721, is only declaratory of the common law, there seems to be no reason why the executor in the principal case should have been relieved of this duty.

FEDERAL PRACTICE—REMOVAL OF CAUSES—FRAUDULENT JOINDER.—The petition for removal controverted the plaintiff's allegation of negligence and charged fraudulent joinder. *Held,* since the evidence warranted a submission of the case to the jury a removal was correctly refused. *Cincinnati etc. Ry. Co.* v. *McElroy* (Ky. 1912) 142 S. W. 1091.

The petition controverted the allegations of the complaint and alleged that the plaintiff knew them to be false. *Held,* a removal should be granted since the State court could not determine the issue of fact. *Western Coal & Mining Co.* v. *Osborne* (Okla. 1911) 119 Pac. 973. See Notes, p. 359.

HABEAS CORPUS—JURISDICTION TO SENTENCE AFTER PLEA OF GUILTY.—The prisoner pleaded guilty to an indictment for burglary in the first degree. Upon subsequent examination by the judge he denied the commission of an element of the crime, but the plea was nevertheless accepted and sentence was pronounced. *Held,* habeas corpus would lie since the judge was without jurisdiction to impose sentence. *Matter of Brandt* (N. Y. 1912) 46 N. Y. L. J. No. 118.

Although habeas corpus will lie where there is no jurisdiction to impose a legal sentence, *People* v. *Liscomb* (1875) 60 N. Y. 559; 10 COLUMBIA LAW REVIEW 672, it has been held that no such lack of jurisdiction exists after a plea of guilty has been entered to a valid indictment. *People* v. *Frost* (1910) 198 N. Y. 110. It is contended in the principal case, however, that a different rule should prevail where an examination of the prisoner after he has pleaded guilty elicits answers which conflict with his plea. While such an examination is wholly proper to ascertain whether the defendant understands the gravity of his situation, 1 Bishop, Crim. Proc., (4th ed.) § 195; *cf. Comw.* v. *Battis* (1804) 1 Mass. 95, it is not an essential part of the judgment-roll, see N. Y. Code Crim. Proc. § 485, and the judge is at liberty to accept the plea as soon as it is made and to pronounce sentence immediately. 1 Bishop, Crim. Proc., (4th ed.) § 1291; *cf. People* v. *House of Mercy* (1891) 128 N. Y. 180, 187. Moreover, since a plea of guilty

is a confession of the acts alleged in the indictment, *People* v. *Quartararo* (1912) 46 N. Y. L. J. No. 132, it is difficult to see how a subsequent denial of any such acts can have the effect of nullifying the plea as a matter of law. On the contrary it would seem that its acceptance or rejection must rest in the sound discretion of the trial judge, *Conover* v. *State* (1882) 86 Ind. 99; see N. Y. Code Crim. Proc. § 337, and that the exercise of this discretion, while perhaps reversible error under the circumstances of the principal case, *Gardner* v. *People* (1883) 106 Ill. 76, did not so completely oust the court of jurisdiction as to render the proceedings reviewable on habeas corpus.

INSURANCE—STANDARD FIRE POLICY—CHANGE OF INTEREST.—The plaintiff contracted to convey the insured premises and placed the deed in escrow. While conditions remained unperformed by both himself and the purchaser, the latter entered into possession and soon after the house burned. *Held,* there was not such a "change of interest" as to work a forfeiture of the policy. *Pomeroy* v. *Aetna Ins. Co.* (Kan. 1912) 120 Pac. 244.

The purpose of the clause in standard fire policies prohibiting change of interest is to protect the insurer against a diminution of the insured's incentive to care for the property. *Skinner* v. *Houghton* (1900) 92 Md. 69; *Grunauer* v. *Westchester Ins. Co.* (1905) 72 N. J. L. 289. It would seem that whenever specific performance of a contract to convey the insured premises may be secured in equity, thus placing the burden of any loss on the vendee, 12 COLUMBIA LAW REVIEW 257, this incentive on the part of the insured would be materially altered, *Skinner* v. *Houghton supra;* see *Gibb* v. *Phila. Ins. Co.* (1894) 59 Minn. 267, but the courts appear reluctant to recognize this unless there has also been a change of possession. *Home etc. Ins. Co.* v. *Tompkie* (1902) 30 Tex. Civ. App. 404. The vendor in the principal case, however, had not complied with all the conditions of the contract, and his right to enforce specific performance was therefore contingent. It would accordingly seem that his incentive to guard against loss was unaffected by the contract. See *Tiemann* v. *Citizens Ins. Co.* (N. Y. 1900) 76 App. Div. 5. This result would not be altered by placing the deed in escrow, for there is no transfer of title until performance of the conditions. *County* v. *Emigrant Co.* (1876) 93 U. S. 124; *Green* v. *Putnam* (N. Y. 1847) 1 Barb. 500. The decision may also be based on the peculiar interpretation of the word "interest" prevailing in Kansas. It is there deemed to apply only when the right of the insured vendor is less than title. *Garner* v. *Mechanics' Ins. Co.* (1906) 73 Kan. 127; but see *Gibb* v. *Phila. Ins. Co. supra; Racing Assn.* v. *Home Ins. Co.* (N. Y. 1906) 113 App. Div. 728.

INTERSTATE COMMERCE—CONFLICTING STATE AND FEDERAL REGULATIONS.—For the purpose of regulating the hours of labor of interstate railroad employees, Congress passed an act which was not to take effect for a year from the date of its enactment. During that period, the State of Washington enacted and attempted to enforce a statute embodying a similar regulation. *Held,* Congress had so acted upon the subject as to preclude State action. *Northern P. R. R. Co.* v. *Washington* (1912) 32 Sup. Ct. Rep. 160.

For a discussion of the principles involved in this case, see 9 COLUMBIA LAW REVIEW 66.

JUDGMENTS—REVERSAL—RESTITUTION BY APPELLEE.—The plaintiff and the defendant were parties to a former action brought to determine water rights. The amount of water apportioned to the defendant by the trial court was reduced on an appeal prosecuted by the plaintiff. The plaintiff seeks damages from the defendant who had in the meantime exercised his rights as determined in the lower court. *Held,* the plaintiff could not recover. *Porter* v. *Small* (Ore. 1912) 120 Pac. 393.

The damage resulting from an injunction erroneously granted is *damnum absque injuria, Mark* v. *Hyatt* (1892) 135 N. Y. 306, since the court does not act as agent of the parties. See *Bridges* v. *McAlister* (1899) 106 Ky. 791. Likewise acts done in enforcing an erroneous as distinguished from an irregular judgment, *Chapman* v. *Dyett* (N. Y. 1833) 11 Wend. 31; *Healey* v. *Dudley* (N. Y. 1871) 5 Lans. 115, are not tortious although the judgment is subsequently reversed. *Thompson* v. *Pearson* (1889) 122 Ind. 454. Since the final decree on appeal determines the legal rights of the parties from the beginning, the protection afforded one acting in obedience to an erroneous judgment can only be justified on grounds of public policy, which secures to the judgments of the courts the respect necessary to the effective administration of justice. *Bridges* v. *McAlister supra.* This consideration of policy would seem equally applicable to the apparently novel situation in the principal case, in which the injury results from neither the enforcement of, nor obedience to an erroneous judgment, but from acts done by one of the parties in reliance on its correctness. Nevertheless the policy which protects one enforcing an erroneous judgment from tort liability, does not demand that he be allowed to keep the benefits which he thereby receives. Hence, even if on account of the peculiar facts in the principal case the judgment should be regarded as "self-executing," the plaintiff should be permitted to recover in quasi-contract upon a complaint properly framed. *Little* v. *Bunce* (1835) 7 N. H. 485.

LIS PENDENS—SUIT RELATING TO PERSONAL PROPERTY—EXTRATERRITORIAL EFFECT.—The plaintiff brought suit in a Federal court in North Carolina to foreclose a mortgage on rolling stock. While that action was pending, the defendant in the present action attached a locomotive in Tennessee under a claim against the mortgagor. The plaintiff now seeks to replevy the locomotive. *Held,* the defendant was bound by the decree in the foreclosure suit in the plaintiff's favor. *North Carolina Land & Lumber Co.* v. *Boyer* (C. C. A. 6th Cir. 1911) 191 Fed. 552. See Notes, p. 361.

LITERARY PROPERTY—OWNERSHIP OF LETTERS—PUBLICATION AND TRANSFER.—The plaintiff sought to restrain the publication and transfer of certain letters of no literary value and on familiar subjects written by his testatrix. *Held,* the publication, but not the transfer, would be restrained. *Baker* v. *Libbie et al.* (Mass. 1912) 97 N. E. 109.

Although it is difficult to find any element of property in the composition of letters of no literary value, 4 Harv. L. Rev. 193, 200, it is well settled that the writer of private letters may suppress their publication regardless of their literary quality, upon the theory that he has a property right which may be protected by injunction. *Woolsey* v. *Judd* (N. Y. 1855) 4 Duer 379; *Folsom* v. *Marsh* (1841) 2 Story 100; but see *Hoyt* v. *Mackenzie* (N. Y. 1848) 3 Barb. Ch. 320. The recipient, on the other hand, as owner of the tangible part of the

communication, *Oliver* v. *Oliver* (1861) 5 L. T. 287, would seem on principle to have the right to make any use of the letter not so public as to amount to publication, for the law of copyright is alone deemed to protect the writer, see *Pope* v. *Curl* (1741) 2 Atk. 342, and a letter must therefore stand on the same footing as any unpublished manuscript. Drone, Copyright, 136; Copinger, Copyright, (4th ed.) 53; *Labouchere* v. *Hess* (1897) 77 L. T. 559. For this reason those decisions which deny that private letters may be promiscuously transferred are with difficulty supported upon any theory of literary property. See *Rice* v. *Williams* (1887) 32 Fed. 437; *Folsom* v. *Marsh supra; contra, Grigsby* v. *Breckenridge* (Ky. 1867) 2 Bush 480. Judicial recognition of a right to immunity from wrongful publicity appears to be a more reasonable basis for protecting the writer against all uses except those which he intended that the recipient should make of the letters. 11 COLUMBIA LAW REVIEW 566. But this right of privacy, it would seem, does not survive the individual, and accordingly it could not have been invoked in the principal case. *Schuyler* v. *Curtis* (1895) 147 N. Y. 434. See Odgers, Libel and Slander, (4th ed.) 22.

PERPETUITIES—NEW YORK RULE—CONSTRUCTION OF TRUSTS.—The testator left his estate, consisting of realty and personalty, to trustees to divide it into six shares, one for each of his children, and to pay over two-fifths of the income of each share to his widow during her life, and the remaining three-fifths, to each child at twenty-one. The *corpus* was to be paid to each child at a time certain, but if any child died previously, leaving no issue, it was to be apportioned among the survivors upon the same trusts. *Held,* the trusts were legal. *Orr et al.* v. *Orr et al.* (1911) 133 N. Y. Supp. 48.

From the decision that the statute authorizing a trust to collect rents and apply to the use, legalized a trust to collect and pay over, *Leggett* v. *Perkins* (1849) 2 N. Y. 297, it logically followed that subd. 3, § 55, 1 R. S. 728, also included a trust to pay over an annuity or part of the income. See *Cochrane* v. *Schell* (1894) 140 N. Y. 516, 533. Accordingly, in construing both the statute and wills, the courts have shown an increasing liberality in order to carry out the testator's intention as far as possible and to avoid the conclusion that he has sought to suspend the power of alienation illegally. See *Ins. Co.* v. *Cary* (1908) 191 N. Y. 33, 42. Thus, where the remainder is to take effect at a time certain, language terminating the trust governs, and words creating an annuity from the income are interpreted to charge the *corpus* of the estate, regardless of the previous language. *Buchanan* v. *Little* (1897) 154 N. Y. 147; *Trust Co.* v. *Flynn* (1907) 188 N. Y. 385. The bequest of an uncertain amount annually would seem equally susceptible of that interpretation. Hence, since a devise to trustees for several beneficiaries is construed to create a separate trust for each, and since, in the instrument under consideration, there was no provision for the apportionment of the subshares upon the death of a second child, *Schey* v. *Schey* (1909) 194 N. Y. 368; *Chastain* v. *Tilford* (1911) 201 N. Y. 538, the power of alienation was not suspended unduly, for no share was rendered inalienable for a greater period than the lives of two children. Real Prop. L. §§ 42, 96, 103; *Stringer* v. *Young* (1908) 191 N. Y. 157. Thus words used to create an assignable annuity under subd. 2 may create an inalienable interest under subd. 3, § 96 Real Prop. L., as a result of the confusion caused by *Leggett* v. *Perkins supra. Cf.* 4 COLUMBIA LAW REVIEW 429. It seems possible, therefore, that the Revisers of 1896 intended to place all

trusts to pay over annuities under subd. 2 and thus to restore in part the avowed intention of the Revisers of 1830 to create trusts for incompetents only under subd. 3. See Original Revisers' Notes in Fowler, Real Property, (3rd ed.) 1295.

PLEADING AND PRACTICE—NEW TRIAL—LIMITATION TO SINGLE ISSUE.—In a personal injury action the jury awarded the plaintiff $200 damages. Upon motion of the plaintiff the trial court set aside this award and ordered a new trial to be confined to that issue. *Held,* the action of the trial court was erroneous both because the verdict was the result of compromise and because no verdict can be set aside in part. *Simmons* v. *Fish* (Mass. 1912) 97 N. E. 102.

In some jurisdictions a new trial cannot be confined to a single issue but it throws open the entire case. *Schintz* v. *Morris* (1896) 13 Tex. Civ. App. 580. The general view is that while the matter is within the discretion of the court, *Nathan* v. *Railway* (1896) 116 N. C. 1066, yet such a restriction is proper when there are several questions of fact involved in one cause of action, *Mitchell* v. *Mitchell* (1898) 122 N. C. 332; *San Diego Land etc. Co.* v. *Neale* (1888) 78 Cal. 63, or where there is a joinder of several causes of action, *Ramsdell* v. *Clark* (1897) 20 Mont. 103, or of several parties defendant. *Pecararo* v. *Halberg* (1910) 152 Ill. App. 443. There is the sound limitation on the practice that the issues must be clearly separable, *Merony* v. *McIntyre* (1880) 82 N. C. 103, and the restriction must not involve injustice to any of the parties concerned. *Gregg* v. *Wilmington* (1911) 155 N. C. 18. As the *quantum* of the plaintiff's damage seems entirely independent of the question of the defendant's liability, a new trial might properly be confined to the former issue. But as a verdict is an entity the plaintiff should move that it be set aside in its entirety, addressing his prayer for the limitation upon the scope of the new trial to the discretion of the court. See *Nathan* v. *Railway supra.* Moreover, as the court in the principal case held, the determination of legal liability must be the result of the jury's unanimous decision, *Richardson* v. *Coleman* (1891) 131 Ind. 210, and it would be manifestly unfair to restrict a new trial to a question of damages when the verdict fixing the liability was the result of compromise.

SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—LOST INSTRUMENT.—The intestate executed a will devising his realty to the plaintiff in pursuance of his oral agreement to do so, in consideration of the plaintiff's caring for him during his life. The deceased destroyed the instrument, intending to revoke it. *Held,* the plaintiff was entitled to specific performance. *Naylor* v. *Shelton* (Ark. 1912) 143 S. W. 117.

While a will is always revocable before the maker's death, *Hale* v. *Hale* (1894) 90 Va. 728, a contract to convey or devise realty will survive and be specifically enforceable, if the Statute of Frauds is complied with. *Hale* v. *Hale supra; Mutual Life Co.* v. *Holloday* (N. Y. 1883) 13 Abb. N. C. 16. The Statute is construed to require merely that the contract be evidenced by a writing, and a will may be sufficient for that purpose. *MaGee* v. *Blankenship* (1886) 95 N. C. 563. But if the will is lost or destroyed in such a case its contents may be shown by secondary evidence, and a written instrument having been thus established, the terms of the contract which it evidences may be shown without violating the Statute of Frauds. *MaGee* v. *Blankenship supra; Brinker* v. *Brinker* (1847) 7 Pa. 53; see *Roehl* v.

Haumesser (1887) 114 Ind. 311. Accordingly, if the will in the principal decision set out the terms of the agreement with sufficient definiteness, the plaintiff was entitled to the relief prayed for. Otherwise the agreement should not have been enforced, for since the plaintiff could have been amply compensated by an action in quasi-contract, she had not so changed her position that equitable relief was necessary to prevent fraud. *Maddison* v. *Alderson* (1883) L. R. 8 App. Cas. 467; see note to *Christy* v. *Barnhardt* (Pa. 1850) 53 Am. Dec. 538, 540; 4 COLUMBIA LAW REVIEW 294. In many American jurisdictions, nevertheless, specific performance is liberally granted under similar circumstances. *Darby* v. *Maxfield* (1910) 244 Ill. 214; see note to *Grindling* v. *Reyhl* (Mich. 1907) 15 L. R. A. [N. S.] 466.

STATUTE OF FRAUDS—SALE OF GOODS—PART PAYMENT.—Timber was delivered and accepted under an oral contract of sale, and part payments were made during the time of delivery. The Wisconsin Statute of Frauds provides for part payment "at the time" of making the contract as a substitute for a writing. *Held,* the contract became valid upon delivery and partial payment. *Allen* v. *City of Greenwood* (Wis. 1912) 133 N. W. 1094.

The decision seems to involve a confusion of different clauses of that section of the Statute which relates to the sales of goods. In most jurisdictions the result reached might have been based on the fact either of delivery and acceptance or of part payment. But in contradistinction to the Statute of Frauds as enacted in England and most of the American States, the Wisconsin, like the New York Statute, requires that the part payment and the making of the contract be contemporaneous in order to avoid the operation of the Statute. The courts of these jurisdictions have uniformly held that mere payment at a later date will not satisfy the Statute. *Bates* v. *Chesebro* (1873) 32 Wis. 594; *Jackson* v. *Tupper* (1886) 101 N. Y. 515. There must be in addition an express re-statement or re-affirmation of the terms of the prior agreement, *Colton* v. *Raymond* (1902) 114 Fed. 863; *Hunter* v. *Wetsell* (1881) 84 N. Y. 549; see *Crosby Hardwood Co.* v. *Trester* (1895) 90 Wis. 412, or its existence must be recognized, as by making the payment for the avowed purpose of taking the contract out of the Statute. *Bissell* v. *Balcom* (1868) 39 N. Y. 275. But in none of these cases is part payment deemed to validate the old agreement, a result which follows from acceptance, and subsequent payment has no efficacy except when the circumstances under which it was made show that at that time a new contract was made between the parties.

SURETYSHIP—SUBROGATION—CREDITOR'S RIGHTS AGAINST SECURITY HELD BY SURETY.—The principal had put in the surety's hands cash security, which the latter had paid out on other obligations incurred on account of the same principal. Both principal and surety were insolvent. The creditor sought to reach money in the surety's hands as being impressed with a trust in his favor. *Held,* he might so recover. *People* v. *Metropolitan Surety Co.* (1911) 132 N. Y. Supp. 829. See Notes, p. 351.

TAXATION—WATER POWER—SITUS.—The plaintiff sought to restrain the collection of a State tax upon the right to use water power granted him in gross by the United States. The Federal Government developed

the power on land purchased by it with the consent of the State. *Held,* the plaintiff's interest being a *profit à prendre* had its *situs* in land owned by the Federal government, and was therefore not subject to State taxation. *Moline Water Power Co.* v. *Cox* (Ill. 1911) 96 N. E. 1044.

When water power is developed and applied in different places, its *situs* as a distinct subject of taxation has seldom been determined except where the owner of the land producing the power also possessed the right to its use. Under these circumstances by the one view, the power is considered to have only potential existence until used, and must therefore be taxed at the place of such user. *Boston Mfg. Co.* v. *Newton* (Mass. 1839) 22 Pick. 22; *cf. Blackstone Mfg. Co.* v. *Blackstone* (1908) 200 Mass. 82. By the other, its *situs* is deemed that of the land upon which it is created, on the theory that it represents an interest therein. *Water Power Co.* v. *Auburn* (1897) 90 Me. 60; *Cocheco Co.* v. *Strafford* (1871) 51 N. H. 455. The correctness of this view becomes apparent when the right to the power is severed from the ownership of the land, for it is clear that user is unnecessary to make it a property right. Its *situs* for purposes of taxation should therefore depend only upon its nature. The tendency of American authorities is to treat such a right as an interest in land, even when granted in gross, Washburn, Easements, (4th ed.) § 12-*a; cf. Goodrich* v. *Burbank* (Mass. 1866) 12 Allen 456, although it is generally considered an easement and not a *profit. Bank* v. *Miller* (1881) 6 Fed. 545. As an interest in land, its *situs,* originally that of the now servient tenement, would seem unaffected by the change in its ownership. See *Amoskeag Co.* v. *Concord* (1891) 66 N. H. 562; *Stockton etc. Co.* v. *Joaquin* (1905) 148 Cal. 313; *cf.* 1 Wharton, Confl. of L., (3rd ed.) § 286. But where a right is not granted as an appurtenance to the land on which it is to be used, *Matter of Hall* (1907) 116 App. Div. 729, aff'd 189 N. Y. 552, it would seem nothing more than a contract right, 7 COLUMBIA LAW REVIEW 536, and, as such, taxable as personalty.

TRUSTS—CHARITABLE TRUSTS—NEW YORK RULE.—A bequest was made in trust "to provide shelter, necessaries of life, education, general or specific, and such other financial aid" as might seem fitting to the trustees. *Held,* the trust was valid, the purposes of the gift being sufficiently defined. *In re Robinson's Will* (N. Y. 1911) 96 N. E. 925. See Notes, p. 356.

TRUSTS—SUCCESSIVE ASSIGNMENTS BY BENEFICIARY—PRIORITY OF EQUITIES.—The second of two successive assignees of an equitable fund, who was ignorant of the former assignment, first gave notice to the trustee. *Held,* the assignees should prevail in the order of notice. *Jenkinson* v. *N. Y. Finance Co. et al.* (N. J. 1911) 82 Atl. 36.

Notice to the trustee is not essential to complete the assignment as between the beneficiary and his assignee. Lewin, Trusts, (12th ed.) 902. So the first of successive assignees is preferred by many American authorities upon the ground that equitable interests are freely assignable. *Putnam* v. *Story* (1882) 132 Mass. 205. Nevertheless, a second purchaser who is misled by a prior assignee would certainly be protected by estoppel. It seems arguable also that one purchasing after due inquiry should be given preference over a prior transferee through whose laches the fraud was made possible. See Lewin, Trusts, (12th

ed.) 903; *Ward* v. *Duncombe* L. R. [1893] App. Cas. 369. In many jurisdictions, however, notice is necessary to complete an assignment as between successive assignees and even in the absence of the above circumstances a second assignee who acts in good faith may prevail. See *Ward* v. *Duncombe supra.* In adopting this doctrine the courts were influenced by the bankruptcy rule, that as to third persons it is fraudulent for a vendee to leave the subject-matter of the sale in the vendor's possession. In the case of the assignment notice to the trustee is required as a substitute for a change of possession. See *Dearle* v. *Hall* (1827) 3 Russ. 1. It is at least questionable whether this artificial rule has worked well in practice, see *Ward* v. *Duncombe supra;* 11 Law Q. Rev. 337, and the courts, recognizing its inconsistencies, have confined it to equitable interests in personalty. *Wilmot* v. *Pike* (1845) 5 Hare 14; *Jones* v. *Jones* (1838) 8 Sim. 633. It would be less open to criticism if trustees were under a duty to answer the inquiries of strangers. See 11 Law Q. Rev. *ubi supra.* The principal case shows a tendency on the part of the American courts to adopt the English rule. *Cf. Ex'rs of Luse* v. *Parks* (1864) 17 N. J. Eq. 415; see *Graham Paper Co.* v. *Pembroke* (1899) 124 Cal. 117; note to *Re Phillips* (Pa. 1903) 66 L. R. A. 760.

USURY—NATIONAL BANKS—STATUTE OF LIMITATIONS.—The plaintiff brought suit for twice the amount of the usurious interest paid a national bank, which pleaded the Statute of Limitations. The bank had recovered judgment for the sum loaned less than a year previous to the present action. *Held,* since the usurious transaction was complete when payment of unlawful interest was made, the plaintiff's recovery was barred. *McCarthy* v. *First Nat. Bank of Rapid City* (U. S. Sup. Ct., Feb. 19, 1912) Not yet reported. See Notes, p. 358

WILLS—REVOCATION—REVIVAL.—The testatrix desiring to give effect to her first will, which had been expressly revoked by a second will, destroyed the revoking instrument. *Held,* the first will was revived. *Blackett* v. *Ziegler et al.* (Ia. 1911) 133 N. W. 901. See Notes, p. 353.

WILLS—SIGNATURE—WHAT CONSTITUTES THE END OF THE WILL.—A testator drew his own will, using a printed form. He wrote his bequests on six separate sheets of paper, one side only, and attached them one upon another to the blank space intended for bequests. He signed his name below the testimonium clause at the bottom of the printed blank. *Held,* the subscription complied with the statutory requirement. *Matter of Field* (N. Y. 1912) 46 N. Y. L. J. No. 123.

Under the English and similar Statutes of Frauds it was sufficient for the testator's name to appear in any part of a devise if he did not contemplate a further signature. *Adams* v. *Field* (1849) 21 Vt. 256. This rule of construction has been obviated in New York, Dec. Est. Law § 21, and other jurisdictions by statutes providing that a will must be signed "at the end thereof." Under them the dispositive part of the will must precede the testator's signature; *Glancy* v. *Glancy* (1866) 17 Oh. 134; but unimportant directions and additions thereafter will not invalidate the whole instrument. *Baker* v. *Baker* (1894) 51 Oh. St. 217; *Flood* v. *Pragoff* (1881) 79 Ky. 607. No definite rule can be formulated for determining this "end", but the decisions in these States cover most of the contingencies that may arise. See *Matter of Gilman* (N. Y. 1862) 38 Barb. 364; *Younger* v. *Duf-*

fie (1884) 94 N. Y. 535. The statutes are generally deemed satisfied by a signature so placed as to show unequivocally that the testamentary purpose has been completed. *Swire's Estate* (1909) 225 Pa. 188; *Baker's Appeal* (1884) 107 Pa. 381. The position of the signature is therefore of evidentiary value only, and both the policy of the statute and the intention of the testator would in most cases be effectuated by giving effect to the logical end, even though it does not coincide with the physical end. See *Matter of Foley* (N. Y. 1912) 46 N. Y. L. J. No. 117; *In the Goods of Stoakes* (1874) 23 Weekly Rep. 62. In the principal case, although the two ends are indeed identical, the reasoning of the court formulates a salutary reaction from the rather formalistic tendency evinced by some of the preceding New York decisions. See *Matter of Andrews* (1900) 162 N. Y. 1; *Matter of O'Neil* (1883) 91 N. Y. 516; *Matter of Conway* (1891) 124 N. Y. 455.

WILLS AND ADMINISTRATION—LEGACIES—INTEREST ON LEGACY PAYABLE OUT OF REVERSIONARY PROPERTY.—A testator bequeathed £10,000 to be paid out of an estate inherited by him, which consisted of a reversionary interest following a life estate. The testator died seven years before the reversion fell in. *Held,* the legacy bore interest from the expiration of one year after the testator's death. *Re Walford* (1911) 105 L. T. 739.

A pecuniary legacy bears interest from the time when it is payable, 2 Jarman, Wills, (6th ed.) 1106, which is determined by the testator's intention. *Estate of James* (1885) 65 Cal. 25. Where this is not clearly expressed, the presumption that all assets are reduced to possession within one year after the death of the testator, has led to the adoption of the expiration of that period as the time of intended distribution. *Wood* v. *Penoyre* (1807) 13 Ves. 325; *Marsh* v. *Hague* (N. Y. 1831) 1 Edw. Ch. 174, 187. The great convenience of this rule, *Sitwell* v. *Bernard* (1801) 6 Ves. 520, 540, has resulted in an application so rigid that it yields only to the clearest declaration of an intention to accelerate or postpone the time of payment. *Vernet* v. *Williams* (N. Y. 1885) 3 Dem. 349; *White* v. *Donnell* (1850) 3 Md. Ch. 526. Thus, such intention is not to be inferred from the fact that the legacy is made payable out of a specific fund "when recovered", *Wood* v. *Penoyre supra,* or "after debts are paid", *Kent* v. *Dunham* (1871) 106 Mass. 586, or that the assets cannot be reduced to possession within a year. *Hoagland* v. *Schenck* (1838) 16 N. J. L. 370. But in contradistinction to the case where the estate consists largely of reversionary interests, *In re Blachford* (1884) L. R. 27 Ch. D. 676; see *Lloyd* v. *Williams* (1740) 2 Atk. 108, 109, it has been held that a direction to pay the legacy out of a fund wholly reversionary evinces the testator's intention to postpone payment until the reversion falls in. 2 Jarman, Wills, (6th ed.) 1108; Theobald, Wills, (7th ed.) 189; Gibbon v. Chaytor (1907) 1 Ir. 65; *Wheeler* v. *Ruthven* (1878) 74 N. Y. 428; see *Shobe* v. *Carr* (Va. 1811) 3 Munf. 10. Inasmuch, however, as any indulgence in presumptions of intention is likely to result in great confusion, see *Sitwell* v. *Bernard supra; Gibson* v. *Bott* (1807) 7 Ves. 89, 94, the court evidently preferred to sacrifice intention in a specific case to the convenience of a sound general rule.